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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-398

HERBERT LEO PALM,

Petitioner,

v.

SECRETARY OF HEALTH,
EDUCATION, AND WELFARE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Petitioner prays that upon full review of the record a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 14, 1979, denying a rehearing on the Order of May 11, 1979 of said Court of Appeals granting summary judgment against the Petitioner.

CITATIONS TO OPINIONS BELOW

The final decision of Respondent Secretary of Health, Education, and Welfare's Social Security Appeals Council dated November 16, 1977 is unreported and is printed in Appendix D hereto, infra, p. 1d. The Memorandum and Order of the District Court entered on September 18, 1978 is unreported and printed in Appendix C hereto, infra, p. 1c. The Order of the Circuit Court of Appeals granting summary judgment against Petitioner entered on May 11, 1979 is unreported and printed in Appendix B hereto, infra, p. 1b. The Order of the Circuit Court of Appeals denying a rehearing entered on June 14, 1979 is unreported and printed in Appendix A, hereto, p. 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), Section 205(g) of the Social Security Act, as amended, 42 U.S.C., Section 405(g).

QUESTIONS PRESENTED

1. Was it no judicial error when the District Judge failed to make sure that the filing limitations of 42 U.S.C. §423(b) were never modified outside of Congress, before stating in effect in his Memorandum and Order that same cannot be modified by the Respondent or the Courts under any set of circumstances, when from such inquiries he would have learned that the respondent indeed modified these very same filing limitations on his own authority with Federal Regulations 20 C.F.R. §404.310(c) for severely physically or mentally incapacitated claimants, and in all probability also on other occasions for circumstances comparable to an act of God?

2. Was it due process and equal protection of the laws and no judicial error when the District Judge in his Memorandum and Order acknowledged that the constitutional issue was properly raised before him but he dismissed the Complaint without resolving it or referring it to a Three-Judge District Court for resolution?

3. Was it due process and equal protection of the laws and in the preeminent interest of justice and no judicial error when the Circuit Court of Appeals granted summary affirmance on Respondent's motion claim that Petitioner did not bring Federal Regulations 20 C.F.R. §404.310(c) to the District Court's attention and did not raise the constitutional issue in the District Court when the record shows that he did, and while Respondent at the same time conceded that both issues raised by Petitioner are "SIGNIFICANT, WITH SUBSTANTIAL RAMIFICATIONS"?

4. Was the Circuit Court of Appeals not obligated to either resolve the constitutional issue itself for the first time or, in the alternative, remand it to the District Court for resolution by either the trial judge alone or by a Three-Judge District Court?

5. Is Section 223(b) of the Social Security Act, 42 U.S.C. §423(b), limiting payment of disability benefits to a period commencing 12 months immediately preceding the filing of the application for such benefits the "law", if claimant's officially recog-

nized period of disability commenced on May 18, 1965, but it was impossible for claimant, as in Petitioner's extraordinary case, to file his Application For Disability Insurance Benefits until May 13, 1974, because he was by criminal, unlawful and unconstitutional means (conspiracy, duress, fraud, criminal medical malpractices and other criminal acts causing Petitioner great bodily harm) on the part of United States Government employees and others, including organized medicine and the crime syndicate, prevented from filing his application prior to said May 13, 1974?

6. Have the Courts and the Secretary of Health, Education, and Welfare no power to modify this statute under the circumstances stated above in view of the fact that the Secretary of Health, Education, and Welfare modified this statute with Federal Regulations 20 C.F.R. §404.310(c) for those, who are physically or mentally unable to file a timely application, even though their inability to file is in most instances not as severe as in the circumstances of the instant case, because

others are permitted to file applications on their behalf at no physical danger to themselves pursuant to Federal Regulations 20 C.F.R. § 404.603?

7. If this Court is of the opinion that questions 5. and 6. must be answered to Petitioner's disadvantage, is this statute then not violative of the "due process" and "equal protection of the laws" clauses of the United States Constitution under the circumstances such as stated above and established in the instant case?

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL REGULATIONS INVOLVED

The constitutional provisions are: The 5th and 14th Amendments of the United States Constitution (due process and equal protection of the laws).

The statutory provisions involved are: THE SOCIAL SECURITY ACT: August 14, 1935, ch. 531, title II, §223 as added Aug. 1, 1956, ch. 836, title I, §103(a), 70 Stat. 815, as further amended to the present time, 42 U.S.C. § 423(b), reading in pertinent part:

" (b) ...An individual who would have been entitled to a disability insurance benefit for any month had he filed an application therefor before the end of such month shall be entitled to such benefit for such month if such application is filed before the end of the 12th month immediately succeeding such month."

The Code of Federal Regulations involved is: 20 C.F.R. §404.310(c), reading:

(c) *Certain applications filed more than 12 months after the month the period of disability would end*—(1) *General.* An application to establish a period of disability filed more than 12 months after the month a period of disability would end may be effective to establish a period of disability only under the conditions described in paragraphs (c) (2) and (3) of this section.

(2) *Period of disability ending after January 1968.* An application filed more than 12 months after the month in which a period of disability would end shall be effective to establish a period of disability if:

(i) The disability ended after January 1968; and

(ii) The application is filed not more than 36 months after the month in which the disability ended; and

(iii) The individual is alive at the time the application is filed; and

(iv) The individual's failure to file an application within the period specified in paragraph (b) of this section was due to his physical or mental condition as described in paragraph (c)(4) of this section which rendered him incapable of executing such an application.

(3) [Reserved]

(4) *Failure to file due to a physical or mental condition.* An individual's failure to file an application for a period of disability within the time period for filing specified in paragraph (b) of this section will be deemed to be due to a physical or mental condition, if during such specified period:

(i) His physical condition restricted his activities to such an extent as to render him incapable of executing an application; or

(ii) He was mentally incompetent.

(5) *Effective date.* No monthly insurance benefits are payable or may be increased for any month before January 1968 by reason of the provisions of this paragraph.

20 C.F.R. § 404.603 (e) & (f) reading:

(e) If the claimant (regardless of his age) is mentally incompetent or is physically unable to execute the application, it may be executed by the person who has the claimant in his care or by a legally appointed guardian, committee, or other representative.

(f) Where the claimant is in the care of an institution and is not mentally competent or physically able to execute an application, the manager or principal officer of such institution may execute the application.

STATEMENT OF THE CASE

Petitioner is a naturalized United States citizen since 1943 and a United States Army D-day infantry veteran of the second World War, having been inducted into the United States Army on June 27, 1941 and honorably discharged as Master Sergeant on October 23,

1945. He is a holder of the Bronze Star Medal, Combat Infantryman Badge, Bronze Arrow Head and a Letter of Commendation issued by the Commanding Officer, 24th Cavalry Reconnaissance Squadron, Mechanized, United States Army, endorsed by the Commanding Officer, 4th Cavalry Group, and endorsed by the Commanding General of VII Army Corps. He also has recognized service-connected disabilities. He was never in conflict with the law, except for a few traffic tickets.

Petitioner, on January 6, 1978 filed a Complaint - Civil Action No. 78-0023 - requesting the United States District Court for the District of Columbia to review the Respondent's Social Security Appeals Council's final decision dated November 16, 1977 which granted the Petitioner a period of disability commencing on May 18, 1965, and disability insurance benefits commencing on May 1, 1973 only. (DE 1).[1/]

1/ The abbreviation "DE" used throughout refers to District Court Docket Entry numbers.

The jurisdiction of the District Court was invoked because the case arises under the Social Security Act, Section 205(g), 42 U.S.C. § 405(g).

The only issue the District Court was requested to review was the date of entitlement of monthly disability insurance benefits. It is and has been Petitioner's contention that he was entitled to disability benefits commencing on November 1, 1965 or December 1, 1965, i.e. six months after the onset of the disability, because he was by criminal, unlawful and unconstitutional means on the part of United States Government employees and others prevented from filing his disability claim prior to May 13, 1974, and that basic law principles, common law and the United States Constitution toll or waive the limitations of Section 223 of the Social Security Act, 42 U.S.C. § 423.

The Respondent never denied or refuted the fact that the Petitioner was by criminal, unlawful and unconstitutional means prevented from filing his Social Security disability insurance claim prior to May 13, 1974.

In support of his legal position, Petitioner invoked the 4th, 5th, 8th and 14th Amendments of the United States Constitution and also cited the following authorities:

Scarborough v. Atlantic Coast Line Railroad Co. , 178 F 2d 253 (4th Cir.1949), 15 A.L.R. 2d 491, Certiorari denied 339 U.S. 919, 70 S.Ct. 621,94 L.Ed. 1343;

National Bank of Savannah v. All, 260 F 370, particularly at 370,381,384, 385, (S.C. 4th Cir. 1919);

Philco Corporation v. RCA, 186 F.Supp. 155 (D.C.E.D. Penn. 1960);

Davis v. Wilson, 349 F. Supp. 905 (D.C. E.D. Tenn. 1972);

54 Corpus Juris Secundum §§ 168,197,213;

15A Corpus Juris Secundum § 62.

(Complaint 1.,5.,6.,16.)

Petitioner demanded judgment against the Respondent for payment of disability benefits in the amount of $ 218.70 per month, commencing on November 1, 1965 or December 1, 1965, i.e. six months after date of onset of disability, until and including the month of April, 1973, or in whatever month-

ly amount or amounts the Social Security Act, as amended, authorizes such disability benefits for that period, together with interest on the total amount of backpay, commencing on April 21, 1975 (date of initial award) and ending on the date of payment of the total backpay, together with the costs and disbursements of this action.

In his Answer, Respondent did not claim or submit any evidence at all disproving Petitioner's statement and submitted substantial evidence of the circumstances for the late filing of his claim contained in the 454-page administrative record then on file with the District Court and now on file with this Court. (DE 8, 9, 12,21,22).

Respondent's subsequent Motion For Judgment On the Pleadings and Memorandum Of Points And Authorities thereto again did not deny or refute the fact that the Petitioner was by criminal, unlawful and unconstitutional means prevented from filing his disability insurance claim, and requested judgment in Respondent's favor on the sole ground that 42 U.S.C. § 423 (a) & (b) precludes payment to Petitioner of disability insurance benefits for the period from May, 1965 to May, 1973.(DE 20).

Petitioner's Motion In Opposition To Respondent's Motion For Judgment On The Pleadings And Petitioner's Cross-Motion For Judgment On The Pleadings and Memorandum Of Points And Authorities In Support thereof requested judgment against the Respondent as set forth on pages 11 & 12 supra. (DE 25). Petitioner by reference to the certified transcript of the administrative record showed that he had submitted to the Respondent for the administrative proceedings substantial evidence proving that he was by criminal, unlawful and unconstitutional means prevented from filing his Application For Disability Insurance Benefits prior to May 13, 1974, and from obtaining the required true and correct Social Security Medical Report prior to September 24, 1974. He argued that Section 223(a) & (b) of the Social Security Act, 42 U.S.C. §423 (a) & (b) is not the "law" in this extraordinary case, and if it were, this statute would be in violation of the "due process" and "equal protection of the laws" clauses of the United States Constitution. He argued further that the facts underlying the court decisions cited by the Respondent

involved no criminal, unlawful or unconstitutional acts, but if in Flemming v. Nestor, 363 U.S. 603 (1960) the majority of the Supreme Court had found an unconstitutional act, the decision would have gone in Nestor's favor, and that in Sweeney v. Secretary of Health, Education, and Welfare, 379 F. Supp. 1098 at 1098 (4.), 1101 (4),(E.D.N.Y. 1974), the District Court made it clear that if Sweeney had been able to prove that it was impossible for him to file the application prior to the time he did file it, the court would have decided in his favor.

Petitioner again cited in support of his legal position the authorities already stated in his Complaint and earlier to the Respondent's Social Security Appeals Council, as set forth on page 11, supra.

The District Court's Memorandum and Order entered on September 18, 1978 (Appendix C, p. 1c, infra) granted Respondent's Motion to Dismiss and held that the Court and the Secretary of Health, Education, and Welfare have no power to modify the backpay limitations of Section 223(b) of the Social Security Act, 42 U.S.C. §423(b), even if the

Petitioner was "prevented from applying earlier by a criminal syndicate of killers which continues to threaten him, by an organized medical malpractice conspiracy, which included Government physicians, and by other related and analogous circumstances". The constitutional question raised by the Petitioner was acknowledged but not resolved by the District Court. (Appendix C p. 1c, infra; DE 26). The District Court cited:

Flemming v. Nestor, 363 U.S. 603,(1960)
Burrow v. Finch, 431 F 2d 486, 491, (8th Cir. 1970);
Meadows v. Cohen, 409 F 2d 750 (5th Cir. 1969).

Petitioner filed a timely Notice of Appeal from this Memorandum and Order. (DE 27).

Petitioner's, Pro Se, Appellant's Brief raised essentially the same points as the Questions numbers 5., 6., 7. presented in this petition and supported them with the essential Appendix and Addendum of Statutes and Regulations.

Petitioner argued:

(1) That when Congress enacts filing limitations it goes on the presumption that the claimants affected by them are not preven-

ted from meeting these limitations by criminal, unlawful and unconstitutional means, and that the individuals are secure in their person, that they are not being deprived by someone of life, liberty, or property without due process, that no cruel and unusual punishment is inflicted upon them by someone, and that they enjoy equal protection of the laws. Therefore, Section 223(b) of the Social Security Act, 42 USC §423(b) is applicable only if the above cited conditions prevail with respect to a claimant. But Petitioner proved that these conditions did since May 18, 1965 not and still do not prevail with respect to him.

(2) That the facts underlying the court decisions cited in the District Court's Memorandum and Order involved no criminal, unlawful or unconstitutional acts. In Flemming v. Nestor, 363 U.S. 603 , if the majority of the Supreme Court had found an unconstitutional act, the decision would have gone in Nestor's (claimant's) favor. In Meadows v. Cohen, 409 F 2d 750 (5th Cir. 1969), Mrs. Meadows did not claim and prove that her late filing was due to criminal,

unlawful or unconstitutional interference, and this makes all the difference between cases like hers and Petitioner's case.

That with respect to Petitioner it is proved, however, that unconstitutional acts have been committed against him continuously, causing him great bodily harm, and that it was indeed impossible for him to file his application prior to the time he did file it without facing certain death and without risking further bodily harm and possible death for his aged parents. (Both had been crippled for life by arranged accidents in New York City.) That Congress would certainly not want anyone to do that. Besides, the whole exercise would have been in vain due to the fact that the required true and correct Social Security Medical Report was definitely not obtainable before September 24, 1974. That all this was recognized and accepted as fact by thy Veterans Administration (TR 49) [2/] and has been proved as fact in the Social Security Administration proceedings. And that, therefore,

2/ The abbreviation "TR" used throughout refers to the 454-page administrative record on file with this Court.

there was no reason why Respondent should not have decided in Petitioner's favor.

That the administrative record (TR 1-454) proves that Petitioner by criminal, unlawful and unconstitutional means (continuous conspiracy to violate his civil rights, constitutional rights and human rights; continuous actual severe violations of these rights of his, including infliction of great bodily harm; continuous duress and undue influence; fraud; continuous conspiracy to obstruct justice and the due administration of the laws; malfeasance of United States Government employees with respect to petitioner's case; illegal refusal of consular protection, a statutory right of Petitioner pursuant to 22 U.S.C. §§ 1731, 1732; criminal medical malpractice and nonpractice by United States Government physicians and private physicians in the United States and in Europe; illegal and criminal adulteration of the drinking water, food and medicines for the purpose of poisoning petitioner on the part of New York State and New York City authorities, authorities of foreign countries and private persons,

etc.), was prevented from filing his disability claim under the Social Security Act prior to May 13, 1974. (TR 8, 13-14; Amended Complaint 6., 10., 12., 16.).

That these unlawful actions toll or waive the filing limitations in the instant case pursuant to basic law principles, common law, a civilized country's morality and the United States Constitution. These basic law principles apply to all rights, including "created rights", such as the Social Security Act. (Complaint 4.,5.; TR 8-14).

That it was definitely not the intent of Congress to deprive anyone prevented by criminal, unlawful or unconstitutional means from timely filing of his Social Security disability claim of any part of the Social Security Act, and these basic law principles cited above toll or waive the statute of limitations in such cases also with respect to "created rights" such as the Social Security Act, and Petitioner's case is of this nature. (TR 8,14; Complaint 4.,5.).

That the above cited basic law principles do not permit the Government of the United States to deprive anyone of his legal rights

in general by unlawful means, as it has been doing in Petitioner's case [3/], and then be the beneficiary of such unlawful actions, because this is "contra bonos mores" and tolls the statute of limitations in such cases also with respect to "created rights", and Petitioner's case is of this nature. (TR 8,14; Complaint 4.,5.).

That the authorities for Petitioner's contention are:

(a) Scarborough v. Atlantic Coast Line Co., 178 F 2d 253 (4th Cir.1949), 15 A.L.R. 2d 491, Certiorari denied 339 U.S. 919, 70 S.Ct. 621, 94 L.Ed. 1343, and the authorities cited therein;
This decision clearly states that in case of fraud or other deliberate wrongdoing (Petitioner's case is con-

3/ The acts and omissions of the many United States Government employees with respect to Petitioner were criminal acts and resulted for him in preventable persecution and severe bodily harm. They do not fall in the same category as wrong information supplied to claimants by Social Security Administration employees.

siderably worse, since bodily harm was constantly inflicted) the statute of limitations is tolled, also on "created or substantive rights" such as the Social Security Act. This case involved the Federal Employers' Liability Act, and the Social Security Act is of the same "created or substantive rights" category. Therefore, with this decision, the Supreme Court has already set a precedent for the Social Security Act also. (TR 24-30; Complaint 16.).

(b) National Bank of Savannah v. All, 260 F 370, 381, 384, 385 (S.C. 4th Cir. 1919), and the authorities cited therein;
While this decision was rendered prior to enactment of the Social Security Act, it is nevertheless binding upon it. It clearly states that in case of duress, threat to take life or to inflict bodily harm, or any other criminal or wrongful act that is "contra bonos mores" the statute of limitations is tolled. (TR 295-303; Complaint 16.).

(c) Philco Corporation v. RCA, 186 F. Supp. 155, (D.C.E.D. Penn.1960), and the authorities cited therein;
This decision clearly states that in case of conspiracy or duress the statute of limitations is tolled in general. This decision was under the Sherman Anti-Trust Act which Petitioner believes is also a "created or substantive right". (TR 304-306; Complaint 16.);

(d) Davis v. Wilson, 349 F. Supp. 905 (DCED Tenn. 1972), and the authorities cited therein;
This decision clearly states that if some paramount authority prevents a person from exercising his legal remedy, the statute of limitations is tolled; (TR 307-309; Complaint 16.);

(e) Sweeney v. Secretary of Health, Education, and Welfare, 379 F. Supp. 1098 at 1098(4.), 1101(4), (EDNY 1974);
In this Social Security disability late filing case the District Court made it clear that if Sweeney had been able to prove that it was

impossible for him to file the application prior to the time he did file it, the court would have decided in his favor.

(f) 54 Corpus Juris Secundum §168,197,213; 15A Corpus Juris Secundum § 62. (TR 287-294; Complaint 16.).

That it is respectfully submitted that District Judge Gesell erred in holding that the Court and the Secretary of Health, Education, and Welfare have no power to modify the filing limitations of Section 223(b) of the Social Security Act, 42 USC §423(b).

That Federal Regulations 20 C.F.R. § 404.310(c) which modifies these statutory limitations for those disability insurance claimants whose physical condition restricted their activities to such an extent as to render them incapable of executing an application or for mentally incompetent claimants, proves the fact that the Secretary of Health, Education, and Welfare, who issued these regulations, has indeed the power to modify this statute in circumstances that are comparable to an act of God. (For text see pages 7-8, supra).

That Petitioner's circumstances are considerably worse, however, since the crime syndicate, New York City Police Department and organized medicine with their respective international associates, including United States Consuls seen by the Petitioner, prevented him from filing the claim prior to May 13, 1974 by criminal, unlawful and unconstitutional means with infliction of almost continuous bodily harm, aside from death threats. Besides, severe bodily harm was inflicted in New York City by his persecutors on both his parents, and their lives would also have been endangered if Petitioner had tried to file his claim earlier. (TR 47-48; 144-146; 454). And the letter of H.H. Margulies, M.D., (TR 452-453) proves that organized medicine in all countries refused to issue the required true and correct Social Security Medical Report as late as August 15, 1974.

That on the other hand, the physically and mentally incapacitated claimants, for whom the Secretary of Health, Education, and Welfare made these filing date modifications, are in most instances in this respect not as badly off as Petitioner,

provided that they are not victims of criminal acts by organized medicine and/or organized crime, because the chances are good that the institutions which treat them will file timely applications on their behalf or help their relatives or attorneys in filing them. Federal Regulations 20 C.F.R. § 404.603 , page 8, supra, permits others to file applications for physically or mentally incapacitated claimants, whereas in Petitioner's case no lawyer was willing, up to this date even, to represent him in the United States due to the involvement of organized medicine and organized crime.

That since the Secretary of Health, Education, and Welfare has demonstrated with Federal Regulations 20 C.F.R. §404.310(c) that he has the power to modify Section 223(b) of the Social Security Act, 42 USC §423(b), for the severely physically or mentally incapacitated claimants, he most certainly has even more so the power to modify this statute where criminal, unlawful or unconstitutional interference is involved. It is in fact his duty to do so on the basis of basic law principles and the United States Constitution and of the

principles all three branches of the United States Government stand for, and Congress would certainly not fault him but commend him for doing so in the instant case and similar circumstances.

That it is, therefore, respectfully submitted that if Section 223(b) of the Social Security Act, 42 U.S.C. §423(b) were the "law" in the instant case and cases of similar circumstances, this statute would be in violation of the "due process" and "equal protection of the laws" clauses of the United States Constitution, because it would constitute "an arbitrary governmental action" and would "manifest a patently arbitrary classification, utterly lacking in rational justification."

The authority for this is: Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373, where at 1368 of 80 Supreme Court Reporter the Supreme Court is quoted as stating:

> 7. "While not every defeasance of the accrued interests of a person who is covered by the Social Security Act is violative of the Constitution, employee's interest is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the due process

clause. Social Security Act, §202(n) as amended, 42 USCA §402(n); USCA Const. Amend. 5."

9. "Particularly in connection with the withholding of a noncontractual benefit under a social welfare program, the due process clause interposes a bar only if the statute in question manifests a patently arbitrary classification, utterly lacking in rational justification. USCA Const. Amend. 5."

That there is hardly anything more "arbitrary" than to demand from a claimant to risk his life and that of his relatives when filing a Social Security disability claim, if he wishes to get all the benefits due him, and on top of it not to make available to him an examination by a physician who could be relied upon to issue a true and correct factual Medical Report.

That it is Petitioner's firm belief, however, that the Courts and the Secretary of Health, Education, and Welfare were as a matter of course empowered by Congress to modify Section 223(b) of the Social Security Act, 42 USC §423(b) under circumstances as presented in the instant case, and that Federal Regulations to that effect are overdue.

That for the foregoing reasons, Petitioner requests the Court of Appeals to either reverse the District Court's Memorandum and Order dismissing the Complaint, and to order Respondent to grant the relief sought in the Complaint, or to declare the statute in question unconstitutional if its text governs also cases where criminal, unlawful or unconstitutional interference in the filing of claims is involved.

Respondent filed a Motion For Summary Affirmance and asked the Court of Appeals that same be treated as his Brief in the event summary affirmance was not granted. The only two (false) issues raised in this Motion were:

(1) That Petitioner did not raise the fact in the District Court that Federal Regulations 20 C.F.R.§404.310(c) actually modified the filing requirements of 42 U.S.C.§423(b) with respect to severely physically or mentally incapacitated claimants, and that for this reason, Respondent has the power to also modify this statute with respect to criminal, unlawful and unconstitutional interference in filing of claims; 4/

4/ Petitioner found 20 CFR §404.310(c) during his research for the appeal only.

(2) That Petitioner did not raise the constitutional issue in the District Court and that for this reason it is not properly raised before the Court of Appeals. 5/

On the other hand, Respondent conceded that "BOTH ISSUES ARE SIGNIFICANT, WITH SUBSTANTIAL RAMIFICATIONS."

Petitioner's Motion in Opposition To Respondent's Motion For Summary Affirmance and Petitioner's Cross-Motion For Judgment On The Issues Presented For Review and/or Petitioner's Reply Brief stated:

(1) That it is the District Judge's duty to know and apply the existing law, including Federal Regulations, on his own initiative, pursuant to 42 U.S.C. §405(g); that from the Memorandum and Order under appeal it is clear that District Judge Gesell believed that 42 U.S.C. §423(b) cannot be modified under any set of cir-

5/ Petitioner, in fact, properly raised the constitutional issue in the District Court and also in the Social Security Appeals Council, and District Judge Gesell acknowledged it in his Memorandum & Order but did not resolve it nor refer it to a Three-Judge District Court for resolution. (Appendix C p. 1c, infra.)

cumstances by the Secretary of Health, Education, and Welfare or by the courts. He, therefore, can be presumed to have overlooked in his research Federal Regulations 20 C.F.R. §404.310(c) which actually modified 42 U.S.C. §423(b). This is understandable in light of the heavy case load District Judge Gesell must, no doubt, carry. It is clear, however, that 42 U.S.C.§405(g) requires the reviewing District Judge to apply the law as it exists, regardless of what the parties cite to him and even more so if the pro se Plaintiff, as in the instant case, is no lawyer, has never attended law school or received any advice or assistance from a lawyer in pursuing his claim. This means, the District Judge must consider and reflect on the facts presented to determine what law (statutes & Federal Regulations, constitutional law, common law, basic law principles, etc.) applies to each aspect of the case before him. He, therefore, could not, as he did, state that modification of 42 U.S.C. §423(b) is impossible without first making sure that it was never modified outside of Congress, and if it was, what the Secretary's authority was for doing so. The District Court's

library is without question more complete and cross-filed as to subjects than the one available to Petitioner in Germany. Besides, the Secretary's own legal staff may have been able to cite to the District Judge the authority for the modification by 20 C.F.R. §404.310(c). It, therefore, is respectfully submitted that this was an understandable but definitely appealable error, and that the interest of justice requires the Court of Appeals' consideration of it. That Petitioner found 20 C.F.R. §404.310(c) during his research for the appeal only. That 20 C.F.R. §404.310(c) seems to provide that severely physically incapable or mentally incompetent claimants can obtain their backpay starting after six months of onset of disability, if either someone else files the claim on their behalf any time during their disability or if the claimants themselves file the claim within 36 months after the month in which their disability ended. That this is a reasonable arrangement for circumstances which are comparable to an act of God, and, as pointed out in the Appellant's Brief, page -14- , Petitioner's circumstances with respect to the filing of the claim

were, however, considerably worse than what they usually are with respect to the institutionalized or social service dependant majority of the severely physically or mentally incapacitated claimants, since the social workers can be expected to promptly see to it that a Social Security claim is filed, because of the criminal, unlawful and unconstitutional interference in Petitioner's case, and his proven inability to obtain the required true and correct medical report prior to September 24, 1974. That Petitioner cited 20 C.F.R.§404.310(c) only as an example of the modification of 42 U.S.C. §423(b) by the Respondent and not for the purpose of invoking its provisions to recover his own backpay, but to obtain the Court of Appeals' judgment ordering the Respondent to modify 42 U.S.C.§423(b) also for circumstances where criminal, unlawful and unconstitutional interference in filing is involved, because both types of circumstances are comparable to an act of God.

(2) That Respondent's claim that Petitioner's constitutional "contentions are not properly raised before this Court(of Appeals) because they are not raised below"

is contrary to the facts and the law and is entirely out of place here, because District Judge Gesell confirmed it in his Memorandum and Order. (Appendix C p. 1c, infra). Therefore, it was the District Judge's error not to resolve it himself or refer the case to a three-judge District Court for resolution of the constitutional issue properly raised before him. That Petitioner, in fact, invoked the 4th, 5th, 8th and 14th Amendments of the United States Constitution already in the Social Security Appeals Council,(TR 18), and the Appeals Council could not possibly fail to notice that constitutional questions were involved here. As such, they owed it to this non-lawyer pro se claimant to state their constitutional doubts in their decision, even though they are not empowered to declare a statute unconstitutional. That then, in the Complaint the 4th, 5th, 8th and 14th Amendments of the United States Constitution were invoked again by Petitioner. (Complaint 1.) The word "unconstitutional" appeared further in Complaint 5.,6.,16. Because Petitioner considered an explanatory statement of constitutional contentions an argumentative subject, he properly presented it at the first oppor-

tunity available for argument in his Cross-Motion For Judgment On The Pleadings and in the Memorandum of Points and Authorities submitted thereto. The court decisions cited in this respect in Respondent's Motion For Summary Affirmance do not require a constitutional argument in the Complaint itself. They merely require that the issue be raised in trial court. And the proper place for such argument is in Petitioner's view in a Motion and Memorandum of Points and Authorities to such Motion. That Respondent's other claim that the constitutional issue was not"briefed" is just as much contrary to the facts. 5A WORDS AND PHRASES, PERMANENT EDITION 1968, PAGE 373 says:

> " The word "brief" is synonymous in law with "points and authorities", being a condensed statement of the propositions of law which counsel desire to establish, indicating the reasons and authorities which sustain them. Duncan v. Kohler, 34 N.W. 594, 595,37 Minn.379"

28 U.S.C.A. Rule 8, Note 15. - Federal Rules of Civil Procedure- states:

> "Where a complaint alleges facts from which the court may reasonably infer lack of an adequate remedy at law or irreparable injury, the want of ex-

press allegations thereof is not fatal to a claim for equitable relief. U.S. v. White County Bridge Commission, C.A. Ill. 1960, 275 F 2d 529".

"Complaint drafted by a pro se litigant must be liberally construed, in view of his lack of professional sophistication. Merckens v. F.I. DuPont, Glore Forgan & Co., C.A.NY 1975, 514 F 2d 20."

"A Complaint is sufficient if the plaintiff is entitled to relief under any legal theory. Thompson v. Allstate Ins. Co., C.A. Ala. 1973, 476 F 2d 746".

"The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Courts of Appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond doubt, see Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805, 7. LEd.2d 762 (1962), or where "injustice might otherwise result". Hormel v. Helvering, 312 U.S. at 557, 61 S.Ct. at 721." Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868, 2877 (1976).

"There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the Court or administrative agency below. See Blair v. Oesterlein Machine Co., 275 U.S. 220, 225. - Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."
Hormel v. Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 721 (1940).

That Petitioner has more than adequately met these tests. That as stated supra, in the instant case the constitutional issue was properly raised in the District Court, and the only thing left for the Court of Appeals to decide was whether it should

use its discretion to itself resolve this issue for the first time or remand the constitutional issue to the District Court for resolution, in the event that the case could not be resolved in Petitioner's favor on the nonconstitutional issue alone. That it is respectfully submitted that no further argument or evidence is required for the Court of Appeals to know that if 42 U.S.C. §423(b) cannot be modified in circumstances as presented in the instant case, this statute would actually require a claimant in these circumstances to risk his life and that of his relatives when filing a Social Security claim, if he wishes to get all the benefits due him, and on top of it, after the application is filed, he would not be able to find a physician, who could be relied upon to issue the required true and correct medical report, and that such statutory requirements would "manifest a patently arbitrary classification utterly lacking in rational justification" and "would not be free from invidious discrimination", and would thus be in violation of the "due process" and "equal protection of the laws" clauses of the United States Constitution. Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 1373; Richardson v.

Belcher, 404 U.S. 78, 81, 92 S.Ct. 254,257 cites with approval Dandridge v. Williams, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162 (cited in Stanton v. Weinberger, 502 F 2d 315, 320 (10th Cir. 1974).

That since Respondent agrees that both issues presented are "SIGNIFICANT, WITH SUBSTANTIAL RAMIFICATIONS", and the constitutional issue was actually properly raised in the District Court, and the Respondent had ample time to respond to it prior to District Judge Gesell's decision, whereas on the modification issue 20 C.F.R. §404.310(c) no submission on Petitioner's part was required in the District Court, because it was District Judge Gesell's duty to know it prior to making his decision, a Summary Affirmance, as demanded by Respondent, would clearly be against the "preeminent interest of justice" and "would seriously affect fairness, integrity, or public reputation of judicial proceedings" not only among the millions of Americans covered by the Social Security system but also abroad. Kassman v. American University, 178 U.S. App. D.C. 263, 266, 546 F 2d 1029, 1032 (1976); United States v. Atkinson, 297 U.S. 157,160 (1936), 56 S.Ct. 391, 392.

That for all these grave reasons, Petitioner requests the Court of Appeals to deny Respondent's Motion For Summary Affirmance, and to either grant the relief requested in Petitioner's Brief or to reverse the District Court's Memorandum and Order and remand the case to the District Court for resolution of the constitutional issue by either District Judge Gesell alone or by a Three-Judge Court, depending on what the Court of Appeals considers legally appropriate in the circumstances, if the Court of Appeals is of the opinion that 42 U.S.C. § 423(b) cannot be modified under the circumstances presented in the instant case, and if it does not wish to use its discretion to itself resolve this issue for the first time.

The Circuit Court of Appeals Order underlying this petition entered on May 11, 1979, (Appendix B p. 1b, infra), affirmed Respondent's Motion For Summary Affirmance without stating the reasons for this decision.

This Order was lost in the mail. On the basis of information obtained from the Clerk of the Court of Appeals by telephone, Petitioner filed in the Court of Appeals a Petition For Rehearing which in its pertinent part stated:

That in Petitioner's opinion, the Court of Appeals has overlooked or misapprehended the following point of fact and law:

1. Respondent's claim that the District Court's Memorandum and Order should be summarily affirmed because
   (a) Petitioner raised the fact that 42 U.S.C. §423(b) was modified by Federal Regulations 20 C.F.R. §404.310(c) for the first time in the Court of Appeals but not in the District Court;
   (b) Petitioner did not properly raise the constitutional issue before this Court of Appeals because it was allegedly not raised in the District Court

is devoid of any merit in fact and in law, because

2. Pursuant to 42 U.S.C.§405(g) the District Court is obligated to review the administrative record and proceedings in their entirety and apply the proper law on its own initiative, and this

even more so where a non-lawyer pro se claimant is involved. By stating that 42 U.S.C.§423(b) cannot be modified by the courts or the Secretary of Health, Education, and Welfare under any set of circumstances, including criminal, unlawful and unconstitutional interference in filing a Social Security claim, District Judge Gesell erred, because 20 C.F.R.§404.310(c) has actually modified 42 U.S.C.§423(b) and there may have been even other modifications in the past outside of Congress. It was, therefore, District Judge Gesell's duty to make absolutely sure that 42 U.S.C.§423(b) was never modified outside of Congress before rendering his erroneous judgment.

3. That the constitutional issue was properly raised by Petitioner in and acknowledged by the District Court in its Memorandum and Order, but the District Court did not resolve it. This was an additional error on the part of the District Court. Besides, Petitioner had invoked the 4th, 5th, 8th and 14th Amendments of the United

States Constitution already in the Social Security Appeals Council (TR 18). Therefore, the only thing left for the Court of Appeals to decide was whether it should use its discretion to itself resolve the constitutional issue for the first time or remand the constitutional issue to the District Court for resolution, in the event that the case could not be resolved in Petitioner's favor on the nonconstitutional issue alone. That it is Petitioner's understanding that the Order of the Court of Appeals stated no grounds for this summary affirmance. That the Court below owes it to this Petitioner and to the millions of Americans covered under the Social Security system as well as to the public reputation of judicial proceedings to state its reasons, if on reconsideration it still believes that Respondent's Motion For Summary Affirmance should be granted in light of all these proven judicial errors and criminal and unconstitutional facts involved in this case.

The Circuit Court of Appeals Order underlying this Petition entered on June 14, 1979 (Appendix A p. 1a, infra), denied Petitioner's Petition For Rehearing and also denied his request therein for a statement of reasons.

REASONS FOR GRANTING THE WRIT

1. District Judge Gerhard A. Gesell was pursuant to 42 U.S.C. §405(g) obligated to make sure that the filing limitations of 42 U.S.C.§423(b) were never modified outside of Congress, before stating in effect in his Memorandum and Order that same cannot be modified by the Respondent or by the courts under any set of circumstances. Had he made such inquiries, he would have learned of the existence of Federal Regulations 20 C.F.R.§404.310(c) with which the Respondent indeed modified these very same filing limitations on his own authority for severely physically or mentally incapacitated claimants, and in all probability he would have learned of other modifications of these filing limitations by the Respondent for other circumstances comparable to an act of God. This was, therefore, a judicial error on the part of District Judge Gesell.

2. The Petitioner properly raised the constitutional issue in his Complaint as well as in his Cross-Motion For Judgment On The Pleadings and in his Memorandum of Points and Authorities submitted thereto,

and District Judge Gesell acknowledged in his Memorandum and Order that the constitutional issue was properly raised before the District Court. The District Judge failed, however, to resolve the constitutional issue or to refer it to a three-judge District Court for resolution. This was also his obligation under the law, and his failure to do so was his second judicial error.

3. Even though Petitioner pointed these facts out to the Court of Appeals, same overlooked or misapprehended these facts in their entirety and granted Respondent's completely meritless Motion For Summary Affirmance. It also denied Petitioner's request for a statement of its reasons. This was an utterly incomprehensible miscarriage of justice.

4. Even if Petitioner had made a procedural error which the record shows he did not, summary affirmance by the Court of Appeals on the basis of the two false and unfounded issues raised in Respondent's Motion For Summary Affirmance would still have been in conflict with the following Circuit Court of Appeals decisions cited in the Petitioner's Motion In Opposition To Respondent's Motion For Summary Affirmance and Petitioner's Cross-Motion For

Judgment On The Issues Presented For Review and/or Petitioner's Reply Brief:

Kassman v. American University, 178 U.S.App. D.C. 263, 266, 546 F 2d 1029, 1032(1976);
U.S. v. White County Bridge Commission, (C.A.Ill.1960), 275 F 2d 529;
Merckens v. F.I.DuPont,Glore Forgan & Co., (C.A.N.Y. 1975), 514 F 2d 20;
Thompson v. Allstate Insurance Co., (C.A. Ala. 1973), 476 F 2d 746.

Further, it would have been in conflict with the following Supreme Court decisions also cited in said Petitioner's Motion and/or Petitioner's Reply Brief:

Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805 (1962);
Hormel v. Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 721 (1940);
Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 2877 (1976) ;
U.S. v. Atkinson , 297 U.S. 157, 160 (1936), 56 S.Ct. 391, 392.

5. On the other hand, Respondent has conceded that the 20 C.F.R.§404.310(c) modification issue and the constitutional issue, both raised by Petitioner, are "SIGNIFICANT, WITH SUBSTANTIAL RAMIFICATIONS". And the

underlying facts are such that they meet the criteria established by this Court in:

Flemming v. Nestor, 363 U.S. 603 (1960), 80 S.Ct. 1367,1368, 1373;
Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 257;
Dandridge v. Williams, 397 U.S. 471, 487 90 S.Ct. 1153, 1162,

with respect to the unconstitutionality of Social Security Act statutes.

6. For all these grave reasons, it was mandatory upon the Court below to deny Respondent's Motion For Summary Affirmance and to either grant the relief requested in the Appellant's Brief or to reverse the District Court's Memorandum and Order and remand the case to the District Court for resolution of the constitutional issue by either District Judge Gerhard A. Gesell alone or by a Three-Judge Court, depending on what the Court below considered legally appropriate in the circumstances, if the Court below was of the opinion that 42 USC § 423(b) cannot be modified under the circumstances presented in the instant case, and if it did not wish to use its discretion to itself resolve this issue for the first time.

7. It is, therefore, established that the court below has rendered a decision which is in conflict with the facts and established law and procedure. It is also in conflict with at least one of its own decisions and with the decisions of a good number of other Circuit Courts of Appeals and Supreme Court decisions on the same subject matter, and the court below has also so far departed from the accepted and usual course of judicial proceedings, and has also so far sanctioned the departure by a lower court, as to call for an exercise of this Court's power of supervision. In addition to this, these proceedings have severely violated Petitioner's rights under the 5th and 14th Amendments of the United States Constitution ("due process" and "equal protection of the laws"). Since Respondent agrees that the issues raised by Petitioner are "SIGNIFICANT; WITH SUBSTANTIAL RAMIFICATIONS", the preeminent interest of justice demands this Court's Opinion on these issues. This case will also provide this Court with the opportunity to clarify the filing limitations limits of the Social Security Act, and would thus greatly help to eliminate

future misinterpretations thereof by the courts below and by the Social Security Administration, and would especially make it clear to those, who try to prevent beneficiaries by criminal, unlawful and unconstitutional means from timely filing of their claims, that they cannot succeed.

CONCLUSION

For the foregoing reasons, this Petion For A Writ Of Certiorari should be granted.

Respectfully submitted,

HERBERT LEO PALM, Pro Se

Hauptpostlagernd
6450 Hanau 1
Germany

September 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1017 September Term, 1978

Entered Civil Action No.78-0023
June 14, 1979

HERBERT LEO PALM,
Appellant,
v.
SECRETARY OF HEALTH,
EDUCATION, AND WELFARE

BEFORE: BAZELON and ROBB,
Circuit Judges

O R D E R

On consideration of appellant's petition for rehearing it is

ORDERED by the Court that the aforesaid petition for rehearing is denied, and it is

FURTHER ORDERED by the Court that the request for a statement of reasons included in the petition for rehearing is also denied.

Per Curiam

For the Court:
GEORGE A. FISHER, Clerk
By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1017 September Term, 1978

Entered Civil Action No.78-0023
May 11, 1979

HERBERT LEO PALM,
Appellant,
v.
SECRETARY OF HEALTH,
EDUCATION, AND WELFARE

BEFORE: BAZELON, McGOWAN and ROBB,
Circuit Judges

O R D E R

On consideration of appellee's motion for summary affirmance and of the opposition thereto, it is

ORDERED by the Court that the aforesaid motion is granted and the order of the District Court on appeal herein is summarily affirmed.

Per Curiam

Circuit Judge McGOWAN
did not participate in
this order.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERBERT LEO PALM, Plaintiff, v. SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Defendant.	Civil Action No. 78-0023 Entered September 18, 1978

MEMORANDUM AND ORDER

Plaintiff, a resident of Germany, appears pro se and challenges the decision of the Secretary which limited the Secretary's finding of plaintiff's disability to a period commencing one year immediately preceding the filing of plaintiff's application. Relying on the administrative record which is before the Court and invoking the Constitution of the United States, plaintiff contends that he is entitled to disability for a longer retroactive period because he was prevented from applying earlier by a criminal syndicate of killers which continues to threaten him, by an organized medical malpractice conspiracy, which included Government physicians, and

by other related and analogous circumstances. Defendant's motion to dismiss is presently before the Court on briefs.

Section 223(b) of the Social Security Act, 42 U.S.C. § 423(b), relating to disability insurance benefits provides in pertinent part:

> (b) . . . An individual who would have been entitled to a disability insurance benefit for any month had he filed an application therefor before the end of such month shall be entitled to such benefit for such month if such application is filed before the end of the 12th month immediately succeeding such month.

The Court holds as a matter of law that whatever the facts may be in regard to the reasons why plaintiff did not earlier apply for disability benefits there is no power in the Court to ignore the clear command of this statute. Congress established a controlling standard for awarding benefits which it is beyond the power of the Secretary or the Court to modify under circumstances such as presented here. Flemming v. Nestor, 363 U.S. 603 (1960); Burrow v. Finch, 431 F. 2d 486, 491 (8th Cir.1970); Meadows v. Cohen, 409 F. 2d 750 (5th Cir. 1969).

Accordingly, the motion to dismiss is granted.

SO ORDERED.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

September 15, 1978

APPENDIX D

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of	Claim for
Herbert L. Palm (Claimant)	Period of Disability and Disability Insurance Benefits
	070-14-7876
(Wage Earner) (Leave blank if same) (as above)	(Social Security) (Number)

This case is before the Appeals Council on the claimant's request for review of the administrative law judge's decision dated June 30, 1977. The administrative law judge held that the claimant was entitled to a period of disability beginning August 1, 1967, and to disability insurance benefits under the applicable provisions of the Social Security Act.

The Appeals Council hereby grants the claimant's request for review of the administrative law judge's decision. Since the decision of the Appeals Council is favorable to the claimant, no purpose would be served by giving the usual notice of granting the

request for review.

The administrative law judge's statements as to the pertinent provisions of the Social Security Act and the issues in the case are incorporated herein by reference.

The evidence of record establishes that the claimant has a combination of impairments which together have markedly restricted his functional capacity to perform substantial gainful work activity since the alleged onset date of May 18, 1965.

The remaining issue in this case is the question of when the claimant's first month of entitlement to a disability insurance benefit became effective. In this regard, section 223 of the Social Security Act provides in effect that an individual shall be entitled to a disability insurance benefit when he has satisfied the special insured status requirement, not attained the age of 65, filed an application for benefits and be under disability. Further, the provisions of Section 404.607(b) of Social Security Regulations No. 4 provides in effect that a disability insurance benefit can only begin 12 months immediately preceding the month in which an application

is filed, if all conditions of entitlement are met in such prior months.

Based on the month in which the claimant filed his application for disability insurance benefits, May 1974, the Appeals Council finds that in accordance with the law and regulations, the first month he met all factors of entitlement for a disability insurance benefit was May 1973. Thus no disability insurance benefits are payable earlier than May 1973.

After careful consideration of all the evidence of record, including additional evidence not considered by the administrative law judge, the Appeals Council finds that the claimant is under a "disability" within the meaning of the Act; that the "disability" commenced on May 18, 1965, and continues on the date of this decision; and that the special earnings requirements of the Act are met for the purpose of entitlement.

It is the decision of the Appeals Council that, based on the application filed on May 24, 1974, the claimant is entitled to a period of disability commencing on

May 18, 1965, and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended. The decision of the administrative law judge, as herein modified, is affirmed.

APPEALS COUNCIL

/s/ Manny H. Smith
Manny H. Smith, Acting Member

/s/ H.D. Ponce de Leon
H.D. Ponce de Leon, Member

Date: November 16, 1977